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In the Supreme Court of the United States

OCTOBER TERM, 1980

ALVINA E. SCHWARZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the government may be held liable on a negligence theory under the Federal Tort Claims Act for failing to prevent a former member of the military, who was in the care of Veterans Administration doctors, from committing suicide.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 3

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Addington v. *Texas*, 441 U.S. 418 7

Bellah v. *Greenson*, 81 Cal. App. 3d 614, 146 Cal. Rptr. 535 ..... 4, 5, 6

Blessing v. *United States*, 447 F. Supp. 1160 8

Brooks v. *United States*, 152 F. Supp. 535 8

Confiscation Cases, 74 U.S. (7 Wall.) 454 8

Dillon v. *Antler Land Co.*, 341 F. Supp. 734, aff'd, 507 F. 2d 940, cert. denied, 421 U.S. 992 8

Fahey v. *United States*, 153 F. Supp. 878 8

Gee v. *Tenneco, Inc.*, 615 F. 2d 857 3

Lawless v. *Calaway*, 24 Cal. 2d 81, 147 P. 2d 604 4

Martinez v. *California*, 444 U.S. 277 7

Meier v. *Ross General Hospital*, 69 Cal. 2d 420, 445 P. 2d 519, 71 Cal. Rptr. 903 4

Page

Cases—Continued:

Parham v. *J. R.*, 442 U.S. 584 7

Redmond v. *United States*, 518 F. 2d 811 8

Simone v. *Sabo*, 37 Cal. 2d 253, 231 P. 2d 19 4

Smith v. *United States*, 375 F. 2d 243, cert. denied, 389 U.S. 841 8

Tarasoff v. *Regents of the University of California*, 17 Cal. 3d 425, 551 P. 2d 334, 131 Cal. Rptr. 14 ..... 3, 4

United States v. *English*, 521 F. 2d 63 3

United States v. *Faneca*, 332 F. 2d 872, cert. denied, 380 U.S. 971 8

United States v. *Nixon*, 418 U.S. 683 8

Vistica v. *Presbyterian Hospital*, 67 Cal. 2d 465, 432 P. 2d 193, 62 Cal. Rptr. 577 4

Vitek v. *Jones*, No. 78-1155 (Mar. 25, 1980) 7

Statutes and rule:

Federal Torts Claim Act, 28 U.S.C. 2671 *et seq.* 1

28 U.S.C. 2680(a) 2, 7, 8

28 U.S.C. 1346(b) 1, 3

Cal. Gov't Code § 856 (West 1967 & Supp. 1979) 2

Rule 41(b), Fed. R. Civ. P. 1

Miscellaneous:

Restatement (Second) of Torts (1965) 3

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-2) is not reported. The opinion of the district court (Pet. App. A-4 to A-19) is also not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1980. The petition for a writ of certiorari was filed on September 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises out of the suicide of Raymond J. Schwarz, a former enlistee in the United States Navy, who had, subsequent to his discharge from the Navy, been under the care of Veterans Administration (VA) doctors for psychiatric treatment as well as for the treatment of various physical ailments (Pet. App. A-5 to A-9).

Petitioner, the mother of Raymond Schwarz, filed this wrongful death action against the United States under the provisions of the Federal Tort Claims Act in the United States District Court for the Northern District of California (Pet. App. A-9). Petitioner alleged that the VA doctors were negligent in failing to take appropriate steps to prevent Raymond Schwarz from committing suicide, either by having him committed to a hospital on an in-patient basis or by warning petitioner, Raymond's mother, of his suicidal tendencies. Such negligence, petitioner argued, gives rise to liability under 28 U.S.C. 1346(b) and 2671 *et seq.* (Pet. App. A-9).

Following presentation of petitioner's evidence, the district court granted the government's motion to dismiss under Rule 41(b), Fed. R. Civ. P., finding: (1) that the VA doctors had no duty under California law to warn

petitioner of Raymond's suicidal tendencies (Pet. App. A-10 to A-19); (2) that, in any event, petitioner "had *actual knowledge* that decedent was contemplating suicide and that [petitioner] had such knowledge some twelve days prior to decedent's suicide" (Pet. App. A-15 n.5; emphasis in original) and, therefore, did not need to be warned; (3) that the "evidence clearly supports a conclusion that the Veterans Administration's physicians did not fall below [the applicable standard of care]" and that the physicians' conduct was "prompt, responsible, thorough, and professional" (Pet. App. A-15); (4) that petitioner had "failed to establish by a preponderance of the evidence that the decision [not to seek involuntary commitment of the decedent] constituted actionable negligence," in view of conflicting evidence regarding professional judgment in these matters and constraints against involuntary commitment imposed by California law (Pet. App. A-16 to A-17); (5) that the failure to commit Raymond to in-patient care on an involuntary basis was not, in any event, the proximate cause of his suicide (Pet. App. A-15 to A-16); and (6) that the decision not to commit Raymond involuntarily to in-patient care falls within the discretionary function exception in 28 U.S.C. 2680(a) (Pet. App. A-17 to A-18).[1]

The court of appeals affirmed in a memorandum opinion (Pet. App. A-1 to A-2).

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[1]The district court also concluded that the failure to commit the decedent voluntarily when he so requested on April 11, 1972, also fell within the discretionary function exception (Pet. App. A-15). That determination was based on the fact that the Fort Miley hospital, where decedent went for care, had no in-patient psychiatric facilities and that the decision by the VA not to include such facilities at Fort Miley was a discretionary function (*ibid.*).

The district court also relied (Pet. App. A-18) on Cal. Gov't Code § 856 (West 1967 & Supp. 1979), which provides *absolute* immunity for public employees of designated facilities with respect to their decisions to commit persons to in-patient care.

ARGUMENT

The sole thrust of petitioner's argument (Pet. 10-20) is that the district court and the court of appeals erred in assessing California law regarding the existence and nature of a duty owed by a psychiatrist to protect a patient from self-inflicted harm.[2] The decisions of the court of appeals and the district court, however, are plainly correct and do not conflict with the decisions of this Court or of any other court of appeals.[3] Further review of the questions of state law presented is unwarranted.

1. In support of petitioner's contention that the VA was under an obligation to protect decedent from self-inflicted harm, petitioner argues (Pet. 10-13) that *Tarasoff* v. *Regents of the University of California*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976), established an exception to the common law rule that one person owes no duty to control the conduct of another or to warn those endangered by such conduct. *Restatement (Second) of Torts* §§ 315 and 314, comment c (1965). The *Tarasoff* exception, petitioner argues, provides that a psychiatrist has a duty to prevent foreseeable, self-inflicted harm to his patients.

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[2]It is clear that California tort law applies in this case. See 28 U.S.C. 1346(b) and *United States* v. *English*, 521 F. 2d 63 (9th Cir. 1975). Petitioner does not assert that the courts below ignored California law; rather, her assertion is that the courts were incorrect in their application of California law.

[3]Petitioner asserts (Pet. 8-9) that the court of appeals failed to make an independent determination of the state law questions involved here. There is no indication, however, that the court of appeals failed to review the district court's analysis of the law. The court of appeals merely showed the district court the deference traditionally shown with respect to interpretation of the law of the state in which the district court sits (Pet. App. A-2, citing *Gee* v. *Tenneco, Inc.*, 615 F. 2d 857 (9th Cir. 1980)). In any event, as we show, the district court's conclusions of law were correct.

Tarasoff, however, does not stand for that proposition; rather, as petitioner admits (Pet. 10), *Tarasoff* held only that a psychiatrist has a duty to protect a *third party* from foreseeable harm perpetrated by a patient, even though the third party does not himself stand in any relationship to the psychiatrist.[4] Nonetheless, petitioner contends (Pet. 11) that *Tarasoff* should also be read to encompass a duty to protect the patient, because the court's opinion in *Tarasoff* cited with approval *Vistica* v. *Presbyterian Hospital*, 67 Cal. 2d 465, 432 P.2d 193, 62 Cal. Rptr. 577 (1967). But *Vistica* involved the duty owed by a *hospital* to protect a person who had already been committed to in-patient care from the foreseeable harm he may cause to himself. See also *Meier* v. *Ross General Hospital*, 69 Cal. 2d 420, 445 P.2d 519, 71 Cal. Rptr. 903 (1968). Obviously, however, the duty owed by an institution and its staff to prevent foreseeable harm that may be caused by a person

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[4]The California Supreme Court specifically stated in *Tarasoff* that "the therapist's obligations to his patient require that he *not disclose a confidence unless such disclosure is necessary to avert danger to others* * * *." 17 Cal. 3d at 441, 551 P.2d at 347, 131 Cal. Rptr. at 27 (emphasis added). This limitation on the holding in *Tarasoff* was noted by the court of appeals in *Bellah* v. *Greenson*, 81 Cal. App. 3d 614, 621-622, 146 Cal. Rptr. 535, 539-540 (1978), upon which petitioner relies (Pet. 12 n.1).

Of course, a psychiatrist, like any doctor under California law, has a duty to provide his patients with a standard of care that is commensurate with the degree of learning and skill ordinarily possessed by practitioners of the medical profession in the same or similar locality. This duty includes the exercise of due care in applying such learning and skill to the treatment of his patient. *Lawless* v. *Calaway*, 24 Cal. 2d 81, 147 P.2d 604 (1944); *Simone* v. *Sabo*, 37 Cal. 2d 253, 231 P.2d 19 (1951). The duty that petitioner urges here, however, goes beyond this duty of care and beyond what *Tarasoff* imposed.

already in its custody is something far different from the duty that petitioner asserts was owed in this case by a person who did *not* have such custody.

Thus, it is plain that to read *Tarasoff* in the manner urged by petitioner would require extending *Tarasoff* beyond its actual holding and, in addition, into an area not yet charted by the California courts. Petitioner cites no California court decision upholding a finding of liability in circumstances similar to this case.[5] Thus, given the lack of definitive guidance from the courts in California, the district court was correct in holding that it would be unwise for a federal court, for the first time, to impose a duty "that would be the genesis of profound conflict" for the individual psychiatrist (Pet. App. A-11 to A-12). As the district court observed (Pet. App. A-12), under petitioner's approach the psychiatrist "would face the difficult task of reconciling his particular obligation to keep his patient's shared thoughts in strict confidence with a legal duty to disclose."

2. Even assuming that petitioner's contentions were correct regarding the existence of a duty under California law, she would nevertheless be precluded from recovering. If a psychiatrist had a duty under California law to

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[5]Petitioner cites *Bellah* v. *Greenson*, 81 Cal. App. 3d 614, 146 Cal. Rptr. 535 (1978), for the proposition that "a psychiatrist owes an outpatient a duty of care 'to take appropriate preventive measures' when (1) a psychiatrist-patient relationship exists; and (2) the psychiatrist has knowledge that the patient is likely to attempt suicide" (Pet. 11-12 n.1). However, the complaint in *Bellah* was dismissed because the statute of limitations had run; the above language, therefore, was *dicta*. In any event, it cannot be said here that the VA physicians knew in April 1972 that it was "likely" Raymond would attempt suicide. As the district court observed (Pet. App. A-16), "[t]he only time that decedent exhibited symptoms of acute suicidal tendencies was on February 7, 1972; these symptoms subsided rapidly * * *."

protect a patient from self-inflicted harm, that duty necessarily would break down into two "sub-duties": (1) a duty to warn a person in a guardian-like position, such as a patient's mother, of the patient's suicidal tendencies (but see *Bellah* v. *Greenson*, 81 Cal. App. 3d 614, 146 Cal. Rptr. 535 (1978)); or (2) a duty to give the patient appropriate treatment, including, where necessary, seeking involuntary commitment of the patient to in-patient care. The district court's findings of fact, which petitioner does not challenge (Pet. 5), clearly show that neither "sub-duty" provides a basis for recovery in the circumstances of the case.

First, there was no need to warn petitioner of her son's suicidal tendencies because, as the district court noted (Pet. App. 14 n.15), she was aware of these tendencies at least 12 days prior to decedent's suicide. And because petitioner had actual knowledge of these tendencies to the extent they had manifested themselves, a failure of VA doctors independently to inform her of them could not have been the proximate cause of Raymond's death (*ibid.*). Finally, the district court observed (Pet. App. A-12) that petitioner's own expert witness testified that, although she would have considered it good practice, or even obligatory, to give petitioner some warning, "she recognized that there was respected psychiatric opinion in the community to the contrary (which nevertheless falls within the standard of care)."

Second, the district court found that the VA doctors met the appropriate standard of care in their own treatment of the decedent, both with respect to their out-patient treatment of him and their decision not to commit him involuntarily to in-patient care. See Pet. App. A-15 to A-17. In that regard, it is not disputed that in the 12 days prior to decedent's suicide there was an absence of "acute suicidal potential" (Pet. App. A-15; see also *id.* at

A-9 to A-10), so that hospitalization would not have been indicated during that period.[6] In any event, the district court found that the failure to commit Raymond either voluntarily or involuntarily to in-patient care was not the proximate cause of his suicide (Pet. App. A-15 to A-16).

3. Finally, the district court correctly held that petitioner's claim is barred by 28 U.S.C. 2680(a), which bars tort claims against the United States based on the exercise of or failure to exercise a discretionary function. Petitioner's assertion, in essence, is that the VA doctors should have exercised their professional discretion to commit her son to in-patient care because of his potential threat to himself.

The decision whether the government should commit a person to an institution because of his alleged psychological problems or dangerous propensities is a difficult and sensitive one, calling for the exercise of judgment, predictions about the person's future conduct, protection of the public, and appropriate respect for the individual's rights to remain free of restraint and of the stigma attaching to the mere fact of commitment for these reasons. *Vitek* v. *Jones*, No. 78-1155 (Mar. 25, 1980), slip op. 10-12; *Parham* v. *J.R.*, 442 U.S. 584, 600-601, 605-609 (1979); *Addington* v. *Texas*, 441 U.S. 418, 425-427 (1979); cf. *Martinez* v. *California*, 444 U.S. 277 (1980). The discretion of responsible government officials in determining whether to proceed with commitment in the interests of the individual or protection of society is akin to the exercise of prosecutorial discretion in the criminal

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[6] The record showed that during the week after April 12, 1972, decedent stayed at petitioner's home and that she observed that "he appeared to be getting along all right" (Pet. App. A-9). Certainly it should be presumed that if there were any indication that her son needed hospitalization, petitioner would have taken him to a VA facility, as she had done on April 11, 1972 (see Pet. App. A-8).

context, and for similar reasons falls within the discretionary function exception in 28 U.S.C. 2680(a).[7] See *Fahey* v. *United States*, 153 F. Supp. 878 (S.D.N.Y. 1957). Petitioner's claim alleging that the VA doctors were negligent in not involuntarily committing her son is, therefore, barred for these reasons as well.[8]

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[7]This Court has long recognized the broad prosecutorial discretion vested in officers of the government responsible for enforcing the criminal laws. See, *e.g.*, *United States* v. *Nixon*, 418 U.S. 683, 693 (1974); *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868). Accordingly, the courts have consistently held that the exercise of prosecutorial discretion in declining to bring criminal charges against an individual or to warn the public of his potential for committing criminal acts is a discretionary function within the meaning of 28 U.S.C. 2680(a), depending, as it does, on difficult questions of fact, judgment, enforcement policy, and respect for the rights of the suspect or accused. See, *e.g.*, *Redmond* v. *United States*, 518 F. 2d 811, 816-817 (7th Cir. 1975); *Smith* v. *United States*, 375 F. 2d 243, 246-248 (5th Cir.), cert. denied, 389 U.S. 841 (1967); *United States* v. *Faneca*, 332 F. 2d 872 (5th Cir. 1964), cert. denied, 380 U.S. 971 (1965); *Blessing* v. *United States*, 447 F. Supp. 1160, 1179 n.28 (E.D. Pa. 1978); *Brooks* v. *United States*, 152 F. Supp. 535 (S.D.N.Y. 1957); cf. *Dillon* v. *Antler Land Co.*, 341 F. Supp. 734, 743 (D. Mont. 1972), aff'd, 507 F. 2d 940 (9th Cir. 1974), cert. denied, 421 U.S. 992 (1975).

[8]The district court also correctly determined (Pet. App. A-15) that the discretionary function exception precluded an action based on the decision not to admit decedent voluntarily to the Fort Miley hospital when his mother brought him there. That decision was based on the lack of in-patient psychiatric facilities at the hospital, and the policy decision not to include an in-patient psychiatric facility is clearly a discretionary one. In any event, the district court found (Pet. App. A-15) that the record was "clear that there was no indication of an emergency" when petitioner's son arrived at Fort Miley on April 12 and that "the patient's course of conduct over the ensuing week confirms the doctor's assessment of absence of acute suicidal potential on the morning of April 12, 1972." Commitment therefore was not indicated at that time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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